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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/617,691	07/14/2003	Samuel Clayton Muggride	33277/US	3743

7590 01/22/2007  
DORSEY & WHITNEY LLP  
Intellectual Property Department  
Suite 1500  
50 South Sixth Street  
Minneapolis, MN 55402-1498

EXAMINER
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TRAN LIEN, THUY

ART UNIT	PAPER NUMBER
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1761

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	01/22/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/617,691	<b>Applicant(s)</b> MUGGRIDE ET AL.	
	<b>Examiner</b> Lien T. Tran	<b>Art Unit</b> 1761	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 14 November 2006.
- 2a) ☐ This action is FINAL.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 2,3,5-12,15,17,18,20-26 and 36-42 is/are pending in the application.  
 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 2,3,5-12,15,17-18, 20-26, 36-42 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
 a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)                                | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

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Claims 5,20,39 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

In the amendment filed 11/14/06, applicant amends the above cited claims to include the limitation of the "suspension in an initial state generally forms a discrete layer and that in a baked state, the suspension layer and the IQF fruit migrate together". This limitation is not supported by the original disclosure. The specification does not disclose that the suspension forms a discrete layer and there is no disclosure of the IQF fruit and suspension migrating together.

Claims 5, 20, 39 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 5, what does applicant mean by " the suspension layer and the IQF fruit migrate together"? How can be fruit be moved around? The specification does not define how the fruit migrate.

Claims 2-3, 5-12, 15, 17-18, 20-26,36-42 are rejected under 35 U.S.C. 103(a) as being unpatentable over the cookbook " Recipe encyclopedia" in view of Brain et al, applicant's admission of prior art and Wallin et al.

The cookbook teaches a recipe for apricot pie. The recipe teaches the steps of mixing ingredient to create pie dough, forming a portion of the dough into a pie shell

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placing fruit pieces onto the shell, spooning on filling suspension onto the fruit, smoothing the filling surface, applying a top sheet of pie dough, fitting the sheet over the top of the pie, pressing the dough layers to seal and baking the pie.

The cookbook recipe differs from the claimed method in the use of the type of fruit and the type of suspension. Also, the recipe does not disclose transporting in frozen state.

Applicant discloses on page that it is known to use IQF fruit in making fruit pie.

Brain et al disclose a pie filling. The filling comprises sweetener in amount from 10-60%, a stabilizer in amount from 0-5%, starch in amount from .5-3% and water in amount from 40-80%. The filling is prepared by mixing water with stabilizer and starch, mixing sweetener, remaining water, heating of the sweetener mixture, adding the stabilizer mixture and finish heating the mixture to obtain the filling. The stabilizer includes carrageenan or other suitable hydrocolloid. (see example XIII)

Wallin et al disclose a filling suspension. They teach to increase the amount of starch to adjust the viscosity of the suspension. (see col. 5 lines 1-22)

It would have been obvious to one skilled in the art to substitute the canned apricot for IQF fruit because the use of IQF fruit in making fruit pie is known in the art as shown on page 1. To substitute one conventional fruit for another conventional fruit would have been obvious. It would also have been obvious to substitute the filling for the filling disclosed by Brain et al because the substitution of one conventional filling for another conventional filling would have been obvious to one skilled in the art. It would have been obvious to convey the pie in a frozen state when IQF fruit is used because

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the fruit is frozen. It is obvious the fruit remains frozen because frozen fruit is used and there is no indication the fruit will thaw during processing. The suspension of Brain et al differs from the claimed suspension in the use of sweetener dissolved in water instead of a combination of dried sweetener and liquid sweetener. However, it would have been obvious to one to substitute a conventional liquid sweetener such as corn syrup and to use a combination of liquid sweetener and dried sweetener depending on the flavor desired. Such variation would have been obvious to one skilled in the art. It would have been obvious to one skilled in the art to add additional starch when desiring to adjust the viscosity of the filling to certain level. Wallin et al teach the amount of starch used in the filling can be adjusted to obtain a desired viscosity. It would have been obvious to one skilled in the art to adjust the steps disclosed by Brain et al when different sugar components are used. This can readily be determined by one skilled in the art without undue experimentation. With regard to the product-by-process claims, how the product is made does not determine its patentability. The reduction and increase in viscosity during initial state and during baking is a natural occurrence due to the presence of the starch and gum. When the suspension of Brain et al is used in a pie product, the same thing will occur. When a pie product is frozen, the suspension deposited over the fruit will also be frozen. When the pie is heated, the suspension will thaw causing a decrease in viscosity. As the pie is heated, the starch in the suspension will begin to gelatinize causing its viscosity to increase. The suspension of Brain et al contains starch. The suspension as shown by the recipe is deposited as layer because it is placed on top of the fruit. As to the migrating, it is not understood what applicant

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means by migrating. The suspension dispersed during baking and this will also take place when the Brain et al suspension is used in the pie.

Applicant's arguments with respect to claims 2-3, 5-12, 15, 17-18, 20-26, 36-42 have been considered but are moot in view of the new ground(s) of rejection.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Lien T. Tran whose telephone number is 571-272-1408. The examiner can normally be reached on Monday, Wed-Thursday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Cano Milton can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

January 18, 2007

*Lien Tran*  
LIEN TRAN  
PRIMARY EXAMINER

*Group 1700*